FILE COPY

FILED
FEB 4 1935
CHARLES ELMORE CROP

IN THE

Supreme Court of the United States

OCTOBER TERM, 1934

No. 586

AERO MAYFLOWER TRANSIT COMPANY,
Appellant,

VERSUS

GEORGIA PUBLIC SERVICE COMMISSION, ET AL.,
Appellees.

BRIEF FOR APPELLEES

M. J. YEOMANS,
Attorney General

J. J. E. ANDERSON,
Assistant Attorney General

B. D. MURPHY,
Assistant Attorney General

Atlanta, Ga.

Walter W. Brown Publishing Co., Atlanta, Ga.

INDEX OF CASES

Page

Aero Mayflower Transit Co. v. Georgia Public Service Commission, 176 S. E. 487 ..... 2, 5

Albany Company v. Stanley, 105 U. S. 305, 314 19

Alward v. Johnson, 282 U. S. 509, 513 16

American Transit Co. v. City of Philadelphia, 18 Fed (2) 991 7

Bekins Van Line v. Riley, 280 U. S. 80, 82 13

Bradley v. Public Utilities Commission, 289 U. S. 92 4

Central Lumber Co. v. South Dakota, 226 U. S. 157 13

Clark v. Poor, 274 U. S. 554 ..... 5, 6

Corley and Hamilton v. Snook, 281 U. S. 66, 73 13

Continental Packing Co. v. Woodring, 286 U. S. 352 ..... 5, 10, 11, 12

First National Bank of Shreveport v. Louisiana Tax Commission, 289 U. S. 60 19

Great Northern Railway Co. v. Sunburst Co., 278 U. S. 358, 362 3

Guaranty Trust Co. v. Blodgett, 287 U. S. 509, 513 3

Hartford Accident Co. v. Nelson, 291 U. S. 352 3

Hicklin v. Coney, 290 U. S. 169 ..... 5, 15

INDEX—*Continued*

	Page
Hendrick v. Maryland, 235 U. S. 610	5, 7
Interstate Transit, Inc., v. Lindsey, 283 U. S. 183	6
Kane v. New Jersey, 242 U. S. 160	5, 7
Knights of Pythias v. Meyer, 265 U. S. 30, 32	3
McKinney v. Patton, 176 Ga. 719	4
Miller v. Wilson, 236 U. S. 373, 382	13
Nance v. Harrison, 176 Ga. 674	17
Silver v. Silver, 280 U. S. 117, 125	13
Smith v. Cahoon, 283 U. S. 533	12
Sproles v. Binford, 286 U. S. 374	15
Sprout v. South Bend, 277 U. S. 163	5
Stephenson v. Binford, 287 U. S. 251	4, 5

INDEX OF STATUTES

Georgia Laws 1931, p. 199

Georgia Laws 1931, Ex. Ses. pp. 99, 101

Code of Georgia of 1933, Title 68

Code of Georgia of 1933, Section 68-502

IN THE

Supreme Court of the United States

OCTOBER TERM, 1934

No. 586

AERO MAYFLOWER TRANSIT COMPANY,
Appellant,

VERSUS

GEORGIA PUBLIC SERVICE COMMISSION, ET AL.,
Appellees.

BRIEF FOR APPELLEES

STATEMENT OF CASE

This is an appeal from the Supreme Court of Georgia.

Appellant, a contract carrier engaged in interstate commerce and operating motor trucks into and through the State of Georgia, brought suit to enjoin the enforcement of the Georgia Motor Carriers Act of March, 1931. The trial court sustained a general demurrer to the petition, and this judgment was affirmed by the Supreme Court of Georgia.

The record presents two questions:

First. It is contended by appellant that the Georgia statute is violative of the commerce clause of the Federal Constitution because the license fees required by that statute are burdensome upon interstate commerce and especially as applied to the appellant's business, because the license fee is substantial in amount and is not adjusted to the use made of the public highways of the State.

Second. That the Georgia statute is violative of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States because of certain exemptions provided by the statute.

ARGUMENT

I

The decision of the Supreme Court of Georgia is reported in 176 S. E. at page 487, Advance Sheets for November 22, 1934. It is also set forth in the record in this case (R. 48). The Georgia Motor Carriers Act of 1931 (Georgia Laws, Ex. Ses. 1931, p. 99), (R. 14) prescribes regulations for the operation of motor carriers for hire and motor common carriers for hire. This Act is codified as Chapter 68-5 of the Code of Georgia of 1933, which became effective January 1, 1935, by executive proclamation.

By an Act approved August 27, 1931, enacted at the regular session of that year, the General Assembly provided for the regulation of motor common carriers (Georgia Laws 1931, p. 199), (R. 33, 47). This Act expressly repealed the Act of the extraordinary session

of 1931 in so far as it related to motor common carriers. The Motor Common Carriers Act of August, 1931, is codified as Chapter 68-6 of the Code of Georgia of 1933. Chapter 68-5 of the Code of Georgia of 1933 relates only to motor contract carriers, and Chapter 68-6 relates only to motor common carriers.

In its opinion of September 15, 1934, the Supreme Court of Georgia held that the Motor Common Carriers Act approved August 27, 1931, has reference to motor common carriers only and is not applicable to the business of the appellant, since the petition shows that the appellant is not a common carrier.

This decision by the Supreme Court of Georgia as to the meaning of the Georgia statute is binding.

Hartford Accident Co. v. Nelson,
291 U. S. 352;

Knights of Pythias v. Meyer,
265 U. S. 30, 32;

Great Northern Ry. Co. v. Sunburst Co.,
287 U. S. 358, 362;

Guaranty Trust Co. v. Blodgett,
287 U. S. 509, 513.

There is no complaint in the instant case that the Georgia statute is invalid because it requires the appellant, a contract carrier, to assume the burdens of a common carrier, and no such question is presented.

II

In its opinion of September 15, 1934, the Supreme

Court of Georgia held that the Georgia statute under attack provides a charge

> "not as a privilege tax for carrying on interstate business, but for the use of the public highways of the State, and, properly construed, manifests a legislative intent and expressly allocates the fees of $25.00 for each motor vehicle therein provided for (a) to the cost of administration and enforcing the provisions of the Act and (b) the cost of building, maintenance, and repair of the highways of the State."

See also in this connection

> McKinney v. Patton,
> 176 Ga. 719.

These cases are conclusive that the Georgia statute is not a revenue measure, but was enacted under the police power of the State, and that its purpose was to insure public safety and to regulate the burden upon the highways of the State resulting from their use for the transportation of freight and passengers by persons making the public highways their place of business.

> Stephenson v. Binford,
> 287 U. S. 251;
>
> Bradley v. Public Utilities Commission,
> 289 U. S. 92.

> "It was competent for the State in exercising its control over the use of the highways to make reasonable regulations governing that use by private contract carriers. These regulations may require on the part of interstate as well as intrastate car-

riers the payment of reasonable license fees and the filing of insurance policies to protect the interests of the public by securing compensation for injuries to third persons and their property from the negligent operations of such carriers."

Hicklin v. Coney,
290 U. S. 169;

Continental Packing Co. v. Woodring,
286 U. S. 352;

Stephenson v. Binford,
287 U. S. 251.

See also

Hendrick v. Maryland,
235 U. S. 610;

Kane v. New Jersey,
242 U. S. 160;

Sprout v. South Bend,
277 U. S. 163;

Clark v. Poor,
274 U. S. 554;

Aero Mayflower Transit Co. v. Ga. Public Service Comm.,
176 S. E. 487.

Even if expressly laid as a tax the flat fee of $25.00 per truck required to be paid by the Georgia statute could not be defeated by reason of the interstate character of the appellant's business because, even if such a

tax constituted a direct burden on interstate commerce, it affirmatively appears that it is levied only as compensation for use of the highways and to defray the expense of regulating motor traffic. This is indicated by the express allocation of the fees collected to the enforcement of the regulatory features of the law and to highway purposes.

Clark v. Poor,
274 U. S. 554;

Interstate Transit, Inc., v. Lindsey,
283 U. S. 183.

The contention that the Georgia statute imposes a direct and unreasonable burden on interstate commerce because the license fee required to be paid is a flat annual sum of $25.00 per vehicle and has no reasonable relation to the cost of inspecting, controlling or supervising the interstate business conducted by the appellant, is without merit.

The decision by the Supreme Court of Georgia in this case directly holds that the small fee of $25.00 for each truck is a reasonable charge for the use of the highways for the period specified in the Act. There is no averment in the petition, other than the bald assertion that the fee is unreasonable, tending to show that such is not the fact.

Users of the public highways of a State in interstate commerce may be required to contribute to their cost and upkeep. Carriers for hire, who make the highways their place of business, may properly be charged an extra tax for such use.

Hendrick v. Maryland,
235 U. S. 16;

Kane v. New Jersey,
242 U. S. 160.

There is no allegation that the license fee or tax discriminates against interstate commerce. It is required of all carriers, whether operating in interstate commerce or intrastate commerce.

In

American Transit Co. v. City of Philadelphia,
18 Fed. (2) 991,

the District Court for the Eastern District of Pennsylvania had under consideration an ordinance of the City of Philadelphia imposing an annual flat license fee of $50.00 upon motor busses using the streets of the city in carrying passengers for hire. In its opinion the District Court said:

> "There is nothing in the ordinance before us which applies to interstate commerce, except incidentally. The ordinance applies to all motor busses for hire operating within the city limits. It is conclusively shown by the evidence that the fee of $50.00 is not in the nature of a privilege tax, but is only sufficient to defray the expenses of the administration of the ordinance."

In the instant case the averments of the petition show that substantially all of the license fees collected are expended in the enforcement of the statute. Whatever surplus may remain, however, is expressly allocated to the construction and maintenance of public highways.

In the case last cited the license fee was $50.00 for each vehicle and was imposed by a municipality. It was held to be reasonable, although applying to interstate carriers without reference to their use of the privilege granted. Certainly the license fee imposed by the Georgia statute cannot be said to be unreasonable in amount.

III

Appellant contends that the Georgia statute is violative of the equal protection clause of the Fourteenth Amendment because of certain exemptions. In the statement of the points upon which appellant intends to rely (R. 66) it is set forth that the attack is based upon the following specified exemptions:

(a) Hauls between points not having railroad facilities

(b) Hauls of agricultural or dairy products

(c) The definition of agricultural products exempted in the Act

(d) Hauls by producers and

(e) Merchants in rural districts.

The original petition attacked the statute as violative of the Fourteenth Amendment only on account of the exemption set forth by Paragraph 15 of the original petition (R. 9) as follows:

> "Motor vehicles engaged solely in transporting school children and teachers to and from public schools. And cars and trucks hauling people and farm products exclusively between points not hav-

ing railroad facilities and not passing through or beyond points having railroad facilities, where not more than seven passengers and/or 1½ tons of freight are transported";

and

"Motor vehicles engaged exclusively in the transportation of agricultural and/or dairy products between any of the following points: farm, market, gin, warehouse, or mill, where the weight of the load does not exceed 10,000 pounds, whether such motor vehicle is owned by the owner or producer of such agricultural or dairy products or not, so long as the title remains in the producer."

The original petition made no attack upon the statute as violative of the Fourteenth Amendment because of the language defining agricultural products as including "all country merchants in rural districts who handle poultry and farm products in pursuance to their own business, and not for hire, and timber and/or logs being hauled by the owner thereof, or his agents and/or employees between forest and mill or primary place of manufacturer." The phrase just quoted is a part of sub-division 2 of Section 2 of the Act of March, 1931 (Georgia Laws, 1931, Ex. Ses., pp. 99, 101. Code of Georgia of 1933, Sec. 68-502, R. 16), which is as follows:

"(2) Motor-vehicles engaged exclusively in the transportation of agricultural and/or dairy products between any of the following points: farm, market, gin, warehouse, or mill, where the weight of the load does not exceed 10,000 pounds, whether such motor-vehicle is owned by the owner or producer of such agricultural or dairy products or not, so long as the title remains in the producer. And the word 'producer' shall include a landlord where

> the relations of landlord and tenant or landlord and cropper are involved. The phrase 'agricultural products' as used in this Act shall include fruit, live stock, meats, fertilizer, wood, lumber, cotton, and naval stores, household goods and supplies transported to farms for farm purposes, and/or other usual farm and dairy supplies, and including products of grove and/or orchard, and also poultry and eggs, and also fish and oysters, and all country merchants in rural districts who handle poultry and farm products in pursuance to their own business, and not for hire, and timber and/or logs being hauled by the owner thereof, or his agents and/or employees between forest and mill or primary place of manufacturer."

The appellant makes no point upon the exemption in favor of motor vehicles engaged exclusively in transporting school children and teachers to and from public schools.

It is not shown by the petition that the exemption in favor of vehicles engaged in hauling people and farm products exclusively between points not having railroad facilities, and not passing through or beyond points having railroad facilities actually operates to relieve any carrier for hire.

It is at once apparent that this exemption must necessarily apply to a very limited class of operations. In

> Continental Baking Company v. Woodring,
> 286 U. S. 352,

the Kansas statute was attacked upon a similar ground, and in particular because of an exemption in favor of "motor carriers who shall operate wholly within any city or village of this State, or private motor carriers

who operate within a radius of twenty-five miles beyond the corporate limits of such city, or any village." In that case the Court held that the Legislature in setting up a twenty-five mile zone beyond the limits of municipalities unquestionably had a broad discretion as to where the line should be drawn, and that:

> "In exercising that discretion, the Legislature was not bound to resort to close distinctions or to attempt to define the particular differentiations as to traffic conditions in the territory bordering on its various municipalities. Ohio Oil Co. vs. Conway, 281 U. S. 146-159. This Court has frequently held that the mere selection of a mileage basis in the regulation of railroads cannot be considered a violation of the Federal statute. The practical convenience of such a classification is not to be disregarded in the interest of a purely theoretical or scientific uniformity."

The exemption now under consideration is no broader than the exemption provided by the Kansas Act which was upheld in

> Continental Baking Company v. Woodring, *Supra.*

The Georgia Legislature, in the enactment of this statute, could properly take into consideration the fact that the business of operating for hire exclusively between points wholly without railroad facilities is necessarily so limited in its scope and so unattractive to a commercial hauler as to leave such localities entirely without service if the payment of regulatory fees should be required. It would be difficult, if not impossible, to find a section of Georgia which meets the requirements

of this exemption. This is true because the haul must not only originate in a town having no railroad facilities and terminate in a town having no railroad facilities, but it must not pass through any town which does have railroad facilities.

On this point, the case is controlled by the decision in

> Continental Baking Company v. Woodring,
> *Supra.*

IV

The second ground upon which it is contended that the statute violates the Fourteenth Amendment has reference to the exemption in favor of vehicles engaged exclusively in the transportation of agricultural products.

Appellant relies upon

> Smith v. Cahoon,
> 283 U. S. 553,

where this Court held the Florida Motor Vehicle statute invalid because of the following exemption:

> "Any transportation company engaged exclusively in the transporting agricultural, horticultural, dairy or other farm products and fresh and salt fish and oysters and shrimp from the point of production to the assembling or shipping point enroute to primary market or to motor vehicles used exclusively in transporting or delivering dairy products."

In that case the Court recognized the principle that the State has a broad discretion in classification in the exercise of its power of regulation, citing

Central Lumber Company v. South Dakota,
226 U. S. 157;

Miller v. Wilson,
236 U. S. 373, 382;

Bekins Van Line v. Riley,
280 U. S. 80, 82;

Silver v. Silver,
280 U. S. 117, 123;

Corley and Hamilton v. Snook,
281 U. S. 66, 73.

The distinction between the Florida law and the Georgia statute now under consideration is apparent. The Florida act contained a broad exemption in favor of transportation companies engaged in transporting agricultural products for hire from the point of production to the assembling or shipping point enroute to primary market, and a broad exemption in favor of motor vehicles engaged exclusively in transporting or delivering dairy products, without reference to the point of origin or the point of delivery. The Georgia statute exempts, not transportation companies, but motor vehicles engaged exclusively in the transportation of agricultural or dairy products between specific points, *and then only so long as the title remains in the producer.*

The Supreme Court of Georgia, in passing upon this question, held:

"The language 'as long as the title remains in the producer' limits the operation of the exemption referred to above to such an extent that the only property in

the class mentioned which is exempted is property where 'the title remains in the producer.' This is a reasonable classification in favor of the producer, which will enable movements of the products over the highways so long as the title remains in him without exaction of the prescribed fee. The statute involved in Smith v. Cahoon, 283 U. S. 553, did not contain any such words of limitation as referred to above, and the cases are distinguishable." (R. 60.)

The exemption allowed by the Georgia statute is so hedged about with limitations and restrictions as to afford no substantial privilege to anyone. In order to meet the requirements of the exemption, the particular motor vehicle, as distinguished from the transportation company in the Florida case, must be engaged exclusively in the transportation of agricultural products belonging to the producer between the points mentioned by the Act. If the vehicle is used for any other transportation it is subject to the payment of the license fee. Under the Florida statute the vehicle might be used for any number of purposes, and still be exempt from the payment of the license fees if operated by a transportation company engaged exclusively in hauling agricultural products.

Under the Florida Act the ownership of the agricultural product at the time of the transportation is immaterial. Under the Georgia Act the exemption applies only so long as the title to the agricultural product remains in the producer. Thus, a carrier may transport agricultural products in Georgia without complying with the law only so long as the product belongs to the producer, and the title remains in him, and only so long as it is conveyed in a vehicle used for no other purpose. Under the Florida law, any company engaged exclusively in that busi-

ness may transport agricultural products between the points specified without complying with the law, regardless of the ownership of the product or any other use to which the vehicle may be put.

Under the Florida statute there is no restriction as to the weight of the exempted load. The Georgia statute restricts the weight of the exempted load to 10,000 pounds.

The Florida statute permits the transportation of dairy products between all points by vehicles used exclusively for that purpose. The Georgia statute permits the transportation of dairy products only so long as the title remains in the producer, and only between the points named in the Act, and only where the weight of the load does not exceed 10,000 pounds.

The exemption afforded by the Georgia statute must necessarily apply to a very limited class of transportation. It falls within the rule announced in

> Hicklin v. Coney,
> 290 U. S. 169, 177,

where the Court, in dealing with the South Carolina Motor Vehicle Law, held:

> "The exemption in favor of those hauling lumber and logs 'from the forest to the shipping points' relates to a limited class of transportation simply to places of shipment and does not appear to be unreasonable."

See also

> Sproles v. Binford,
> 286 U. S. 374.

In

Continental Baking Company v. Woodring,
Supra,

the Kansas statute under review regulated all motor carriers, including private carriers engaged in transporting their own property. It was attacked because of an alleged discrimination in favor of agricultural products, the statute providing that it should not apply to

> "the transportation of live stock and farm products to market by the owner thereof or supplies for his own use in his own motor vehicle."

The Court said:

> "The Court found a practical difference between the case of the appellants 'who operate fleets of trucks in the conduct of their business and who use the highways daily in the delivery of their products to their customers,' and that of 'a farmer who hauls his wheat or live stock to town once or twice a year.' The Legislature in making its classification was entitled to consider frequency and character of use and to adapt its regulations to the classes of operations, which by reason of their habitual and constant use of the highways brought about conditions making regulation imperative and created the necessity for the imposition of a tax for maintenance and reconstruction. As the Court said in Alward v. Johnson, 282 U. S. 509, 513: 'The distinction between property employed in conducting a business which requires constant and unusual use of the highways, and property not so employed, is plain enough.'"

The General Assembly of Georgia, in the enactment of the statute under review, knew and must have con-

sidered that the use of the highways for the transportation of farm products while owned by the producer is infrequent and mostly upon rural public roads not embraced within the State Aid System of highways. It must have concluded that the rare instances in which a farmer might employ his neighboring farmer to haul a bale of cotton to the gin, or some other agricultural product to some other point enumerated, would be so rare that it would impose no burden of consequence upon the public highways. As a matter of fact, Georgia has a vast mileage of public roads. Less than ten per cent. of this mileage is improved by hard surfacing, and embraced within the State Aid System of public highways. The remaining more than ninety per cent. of unimproved lateral roads constitutes the system of public roads which the farmer uses to convey his own farm products to market.

The exemption dealt with in Continental Baking Company v. Woodring, *Supra,* was of the same character as the exemption here under consideration. Certainly, the Georgia exemption is no broader than the Kansas exemption because the Kansas statute not only exempted farm products, but all other supplies which the farmer might transport to his farm.

In Nance v. Harrison, 176 Ga. 674, the Supreme Court of Georgia upheld the Georgia mileage tax act as against an attack based upon the identical point here made. The mileage tax act contains an exemption almost identical with that in the Motor Carriers Act in favor of agricultural products.

V

While no attack was made upon the Georgia statute

in the petition of the appellant on account of the classification of rural merchants (R. 9), the statement of points upon which appellant intends to rely (R. 66) sets forth that the law is attacked as unconstitutional because of the classification of merchants in rural districts. A reference to the statute (R. 16) will at once show that this complaint is without any sort of merit. In defining agricultural products the statute makes the definition include "all country merchants in rural districts who handle poultry and farm products in pursuance to their own business *and not for hire.*" The statute undertakes to regulate only *carriers for hire.* Accordingly, the exemption in favor of country merchants means nothing, because country merchants handling poultry and farm products "in pursuance to their own business *and not for hire*" are not subject to the regulations of the Act under its express language.

VI

In conclusion, we desire to say that the attack upon the Georgia statute as violative of the equal protection clause of the Fourteenth Amendment is not based upon any alleged facts which could authorize a finding that the exemptions complained of amount to anything more than mere gestures. The petition does not allege that there is any carrier for hire who is relieved of the burdens imposed by the statute by reason of the exemptions. The exemptions themselves are so restricted that they cannot possibly have application to any considerable portion of the commercial traffic moving over the highways of the State.

Appellant is entitled to relief against the statute

alleged to be unconstitutional only if the statute as applied discriminates injuriously against it.

Albany Co. v. Stanley,
105 U. S. 305, 314;

First National Bank of Shreveport v. Louisiana Tax Commission,
289 U. S. 60.

Furthermore, the failure of appellant to allege that the exemption complained of actually operates to relieve any carriers for hire of the burdens imposed by the statute necessarily points to the conclusion that the exemptions can only cover extremely limited operations.

Respectfully submitted,

M. J. YEOMANS,
Attorney General of Georgia

J. J. E. ANDERSON,
Assistant Attorney General of Georgia

B. D. MURPHY,
Assistant Attorney General of Georgia

ATTORNEYS FOR APPELLEES